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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 417

ARTHUR A. YURDIN, BEATRICE W. YURDIN, IRVING S. MOORIN and PHYLLIS MOORIN,
Petitioners,

vs.

TOWN PLAN AND ZONING COMMISSION OF THE TOWN OF FAIRFIELD and TURNPIKE ASSOCIATES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Errors of the State of Connecticut.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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OPINION BELOW.

The opinion of the Supreme Court of Errors of the State of Connecticut is reported at 145 Conn. 416, 143 A. 2d 639 (1958). It appears in the Petition, pages 18a-24a.

QUESTION PRESENTED.

Respondents object to the form and content of petitioners' questions presented, and therefore submit the following question in lieu thereof.

Whether the Supreme Court of Errors of the State of Connecticut erred in upholding a decision of the Town Plan and Zoning Commission of the Town of Fairfield in making a change of zone, where, at an executive session following a public hearing, said Commission consulted pertinent reports, maps, and studies previously made at its direction by its own professional technical assistants, and heard verbal explanations of such data by its assistants.

STATUTES AND RULE INVOLVED.

Conn. Gen. Stat., 1955 Supp., Secs. 375d, 379d, are printed in Petition, page 14a ff. Conn. Gen. Stat., Rev. 1949, Sec. 837, and Rules for the Supreme Court of Errors, Sec. 441, are set out in respondents' Appendix, pages 1a-3a.

STATEMENT OF THE CASE.

On August 20, 1956, respondent Turnpike Associates, Inc. petitioned respondent Town Plan and Zoning Commission of the Town of Fairfield for a change of zone of certain property located near the intersection of Black Rock Turnpike and Stillson Road. The Commission, while considering the petition of Turnpike Associates Inc., alternatively proposed a change of zone for a somewhat larger area

surrounding this intersection but including the property of Turnpike Associates, Inc.

On September 19, 1956, the Commission held a duly warned public hearing on both proposals, at which time counsel for petitioners and Turnpike Associates, Inc., presented extensive evidence and argument. Likewise, the Commission heard at great length all other persons claiming to have an interest in the proceedings.

On September 26, 1956, the Commission held an executive session, at which time it rendered a decision changing the zone at the intersection of Black Rock Turnpike and Stillson Road to a neighborhood business classification in accordance with its own proposal. Two professional technical assistants, full-time employees of the commission, attended the executive session and discussed and explained various reports on population, residential growth, industrial land use, topographical surveys, surveys of the metropolitan area, population studies, and other materials prepared and assembled by these professional technical assistants at the direction of and for the use of the Commission. Likewise, the Commission and its assistants discussed three alternate plans for the development of a shopping center on Black Rock Turnpike. Thereupon, the Commission exercised the legislative function delegated to it by statute and changed the zone in question.

Petitioners then appealed the Commission's decision to the Court of Common Pleas for Fairfield County, pursuant to Conn. Gen. Stat., 1955 Supp., Sec. 379d. That Court upheld the decision of the

Commission in all respects, including its right to rely in part upon materials prepared for it and explained to it by its planning staff.

Petitioners then appealed to the Supreme Court of Errors of the State of Connecticut, which upheld the decision of the Commission and the lower court, stating in its opinion that the Commission did not violate any rights of the petitioners when it considered reports and other data prepared under its direction by its trained personnel. The Supreme Court of Errors expressly noted that the Commission staff members did not speak in favor of or in opposition to any of the proposals, nor did they attempt in any way to influence the decision of the Commission. The Supreme Court of Errors concluded by stating that the Commission was "entitled to professional technical assistance in doing the statistical work required to enable them to carry out the work of their office . . ."

Petitioners failed to move for rehearing before the Supreme Court of Errors of the State of Connecticut as permitted by Rules for the Supreme Court of Errors, Sec. 441, and have since petitioned this Court for a writ of certiorari. (Appendix, pages 2a-3a).

ARGUMENT.

I.

The Decision of the Supreme Court of Errors of the State of Connecticut Was Correct.

The respondents respectfully submit that this Court should refuse a writ of certiorari for the reason that the decision of the Supreme Court of Errors of the State of Connecticut was unquestionably correct in all respects.

The General Assembly of the State of Connecticut many years ago enacted an enabling statute permitting Connecticut municipalities to exercise zoning powers through a zoning commission. Conn. Gen. Stat., Rev. 1949, Sec. 837, (Appendix, pages 1a-2a), authorizes such commissions to exercise the legislative function of enacting zoning regulations governing land uses. The Supreme Court of Errors of the State of Connecticut upheld the constitutionality of a similar statute, **State v. Hillman,** 110 Conn. 92, 147 Atl. 294 (1929), relying upon **Euclid v. Ambler Realty Co.,** 272 U.S. 365 (1926). Under Conn. Gen. Stat., 1955 Supp., Sec. 375d, a commission may establish, amend, or repeal regulations and boundaries after "a public hearing . . . at which parties in interest and citizens shall have an opportunity to be heard." Under this statutory scheme, the General Assembly has delegated to the municipalities the right under the police power to legislate local zoning regulations and boundaries through a zoning commission. The statute requires a hearing prior to the exercise of the legislative or rule-making function,

but it clearly does not contemplate an adversary proceeding wherein parties are entitled to be confronted with witnesses, to hear all evidence on which a decision may issue, to cross-examine, and to benefit from the requirements of procedural due process, imposed by all courts including the Supreme Court of Errors of the State of Connecticut, in quasi-judicial administrative proceedings as distinct from rule-making. The statute merely requires the commission to hold a hearing so that parties in interest may express opposition to or approval of proposed zoning regulations and boundaries. A party in interest is not entitled to an adversary proceeding on a change of zone. He is simply entitled to an opportunity to be heard. The statutory responsibility for the ultimate legislative decision as to regulations and boundaries rests with the commission. The statute charges the commission with the duty of providing a zoning system for the municipality, and in that capacity they must examine and study local land use problems and formulate regulations to encourage the most appropriate use of land in the municipality. They do not exercise a quasi-judicial function and are not required under state or federal law to confront opponents of a proposed zone change with all evidence upon which they may base their legislative decision.

This Court has held that a party in interest has no right whatsoever, under the Fifth Amendment, to be heard before an administrative agency exercises its rule-making power, **Bowles v. Willingham**, 321 U.S. 503, 519 (1943):

> "It is finally suggested that the Act violates the Fifth Amendment because it makes no pro-

vision for a hearing to landlords before the order or regulation fixing rents becomes effective. Obviously, Congress would have been under no necessity to give notice and provide a hearing before it acted, had it decided to fix rents on a national basis the same as it did for the District of Columbia . . . We agree with the Emergency Court of Appeals . . . that Congress need not make that requirement when it delegates the task to an administrative agency . . . "

The decision of **Bi-Metallic Investment Co. v. State Board of Equalization,** 239 U.S. 441, 445 (1915), applies the same rule to administrative proceedings under state law where the challenge arose under the Fourteenth Amendment:

> "Where a rule of conduct applies to more than a few people, it is impractical that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General Statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."

If the Fifth and Fourteenth Amendments do not require a hearing before the exercise of the legislative discretion in making rules, then clearly the decision of the Supreme Court of Errors of the State of Connecticut in defining the rules for legislative action

by the Commission was correct and should not be overruled by this Court.

Petitioners cite no authority in their petition where any court has required a confrontation of all witnesses and evidence by a legislative body in a rule-making case. In the Supreme Court cases cited by petitioners, the issues involved rate making, applications for permits, longshoreman's compensation matters, railroad trackage facilities, etc. All cases involve a quasi-judicial determination of adversary proceedings. None involves the rule-making power.

Likewise, the Connecticut authorities cited involve chiefly appeals from variances, special exceptions, waivers, or approval of subdivisions by boards of zoning appeals and planning commissions. They again do not involve the rule-making power of the zoning commission. That question, as a matter of Connecticut law, was decided in favor of the respondents in the present case, and should not be reviewed by this court.

Therefore, petitioners respectfully submit that this case was correctly decided on the merits by the Supreme Court of Errors of the State of Connecticut and should not now be reviewed by this Court.

II.

The Supreme Court of the United States Should Not Consider the Question of Constitutionality of Conn. Gen. Stat., Sec. 375d, Because Petitioners Failed to Raise This Claim in the Supreme Court of Errors of the State of Connecticut.

Respondents respectfully submit that this Court should refuse to consider petitioners' Question Two, because petitioners never raised the issue in any court of the State of Connecticut. They now claim, for the first time in any court, that Conn. Gen. Stat., 1955 Supp., Sec. 375d, violates Article 14, Section 1, of the Constitution of the United States.

Petitioners' jurisdictional statement asserts only that the doings of the respondent Town Plan and Zoning Commission in executive session allegedly violated petitioners' federal constitutional rights, and they do not claim in their jurisdictional statement that they raised the question of constitutionality of Sec. 375d at any stage of the proceedings before the courts of the State of Connecticut. They did not assign this question as error in their appeal to the Supreme Court of Errors of the State of Connecticut (Record, page 11), and the issue was neither briefed, argued nor decided by that Court. Furthermore, by their own admission on pages five and six of their petition for writ of certiorari, petitioners did not seek rehearing on any question involved in the judgment of the Supreme Court of Errors of the State of Connecticut although they had a right to do so under Connecticut practice. The record clearly indicates that the issue of constitutionality of Sec. 375d is being raised for the first time in this Court.

This precise issue was decided adversely to these petitioners in **Adler v. Board of Education,** 342 U.S. 485, 496 (1951):

> " . . . Without raising in the complaint or in the proceeding in the lower courts the question of the constitutionality of Section 3021 of the

Education Law of New York, appellants urge here for the first time that this Section is unconstitutionally vague. The question is not before us. We will not pass upon the constitutionality of a state statute before the state courts have had an opportunity to do so."

Therefore, respondents respectfully submit that this Court should not decide petitioners' Question Two pertaining to the constitutionality of Sec. 375d.

III.

The Supreme Court of the United States Should Not Review the Decision of the Supreme Court of Errors of the State of Connecticut Because the Petition for Writ of Certiorari Does Not Establish Special and Important Reasons for so Doing.

Respondents further contend that this Court should refuse to consider the decision of the Supreme Court of Errors of the State of Connecticut for the reason that petitioners do not set forth special and important reasons for the Supreme Court of the United States to review the decision of the Supreme Court of Errors of the State of Connecticut, and do not raise a federal question of substance within the meaning of Supreme Court Rule 19.

Nowhere in their reasons for granting writ of certiorari do petitioners allege that this case presents a federal question of substance, and that special and important reasons exist for this Court to grant the writ. Petitioners devote their entire brief to the erroneous claim that the decision of the Supreme

Court of Errors of the State of Connecticut was wrong. They do not once argue to this Court why it should issue a writ of certiorari and review the case.

As respondents have pointed out in Paragraph I of this Argument, this case not only does not raise a federal question of substance within the meaning of Supreme Court Rule 19, but, in fact, it raises no federal question whatsoever. The authority there cited clearly indicates that there is no requirement of hearing under either the Fifth or Fourteenth Amendments of the Constitution of the United States where an administrative agency engages in the rule-making function. The question presented by this case is one of purely state law, already correctly decided in the Connecticut courts.

Furthermore, petitioners cite no case which indicates that the Supreme Court of Errors of the State of Connecticut decided this case in such a manner as to conflict with the probable decision of this Court. Indeed, the Supreme Court of Errors of the State of Connecticut, decided this case exactly in accord with existing federal precedent.

Likewise, the question presented involves a purely local matter, establishing rules of procedure for a municipality exercising zoning authority delegated to it by the state. Such question involves only a very few litigants in the instant case, and it has little or no bearing on other litigation in other states.

Finally, the question of zoning is primarily one of delegation of the police power by the several states to their municipalities, and it remains purely a mat-

ter of state concern, not warranting the review and jurisdictional supervision of the Supreme Court of the United States.

Petitioners have stated no reasons why this case is so important that it should receive a review by this Court. Respondents respectfully contend that not only was the case correctly decided by the courts below, but that it raises no federal question or matter of special importance warranting a review by this Court.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 30, 1958.

APPENDIX.

Conn. Gen. Stat., Rev. 1949, Sec. 837:

"The zoning commission of each city, town or borough is authorized to regulate the height, number of stories and size of buildings and other structures; the percentage of the area of the lot that may be occupied; the size of yards, courts and other open spaces; the density of population and the location and use of buildings, structures and land for trade, industry, residence or other purposes; and the height, size and location of advertising signs and billboards within the limits of such city, town or borough. Such zoning commission may divide the municipality into districts of such number, shape and area as may be best suited to carry out the purposes of this chapter; and, within such districts, it may regulate the erection, construction, reconstruction, alteration or use of buildings or structures and the use of land. All such regulations shall be uniform for each class or kind of buildings or structures throughout each district, but the regulations in one district may differ from those in another district. Such regulations shall be made in accordance with a comprehensive plan and shall be designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population and to facilitate the adequate provision for transportation,

water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality."

Rules for the Supreme Court of Errors, Sec. 441:

"A motion for reargument will not be entertained unless filed in writing within ten days from the date when the decision is announced, provided, when the decision is announced in July or August the motion may be filed within the first ten days of September, if the party desiring to make the motion, within ten days after the decision is announced, files a notice of his intention to file such a motion. The motion and the notice, if any, shall be filed with the reporter of judicial decisions and eight copies shall be filed with the clerk of the court where the case was tried, who shall send one copy to each of the justices of the supreme court, one copy to the clerk of this court for Hartford County, unless the notice or motion is filed with him, and one copy to opposing counsel; and the clerk of the court where the judgment was rendered shall also notify the reporter of judicial decisions that the copies have been filed with him. The motion shall state briefly the grounds for asking a reargument and need not be printed.

"Unless the chief justice shall otherwise direct, all proceedings to enforce or carry out the

judgment shall, upon the filing of a notice, be stayed until the time for filing the motion has expired, and, if the motion is filed, until its disposition, and, if it is granted, until the appeal is finally determined.

"If such a motion is granted, the clerk of this court in the county where the judgment was rendered shall give notice to the parties and the case will be assigned for hearing on the next day for the assigning of cases, unless it is continued by stipulation or order of the court."